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ABSTRACT

This report examines the background of and the newest developments in U.S. asylum policy in relation to Haitian, Central American, and Vietnamese refugees. The following background areas are explored: (1) the change in policy to stop the influx of asylum seekers; and (2) internal policy debate at the Immigration and Naturalization Service (INS) and the Justice Department. The following aspects of the new restrictive INS policy operations are explored: (1) the immediate impact, in December 1988, on south Texas; (2) the effects of the January 1989 Temporary Restraining Order in Miami (Florida); (3) the effects of lifting the Temporary Restraining Order and instituting a new procedure for detention and deportation of undocumented aliens in south Texas, in February 1989; and (4) the asylum adjudication process. The following aspects of the detention process are explored: (1) prisons versus shelters; (2) the isolation of the Webb County Detention Center outside Laredo (Texas); (3) the Correctional Corporation of America's contract facility in Laredo; and (4) Orantes-Hernandez v. Meese, a legal ruling preventing INS abuses of the asylum policy. The following topics concerning the interdiction and detention of Haitians are explored: (1) the circumvention of due process; and (2) the Krome Detention Center in Florida. The following problems with U.S. asylum policy are criticized: (1) the fallacy of treating asylum as an immigration problem; (2) the persecution of specific immigration populations; and (3) the civil strife that biased policies may cause. Three graphs are included. (JS)

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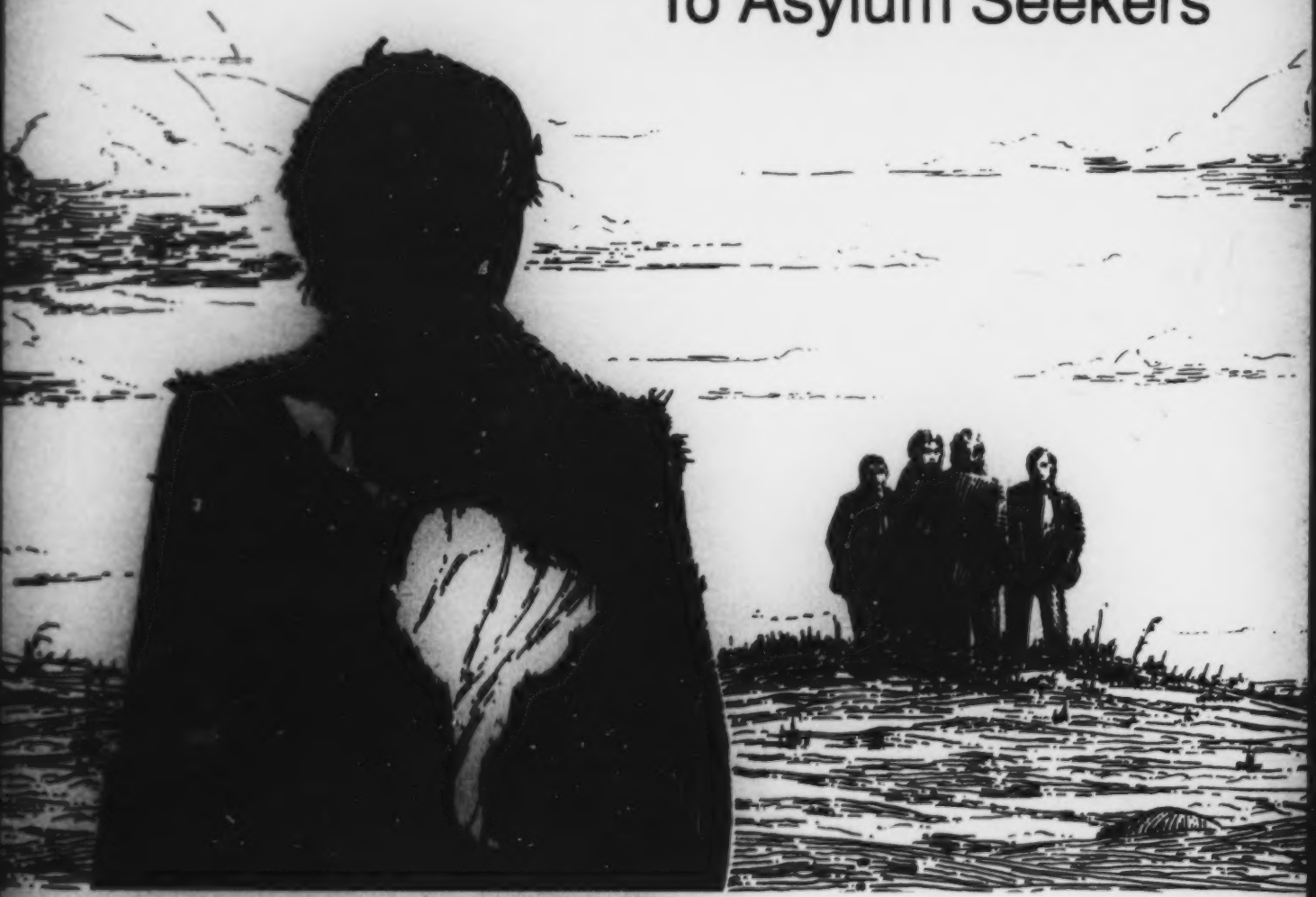
Refugees At Our Border

The U.S. Response To Asylum Seekers



THE U.S. COMMITTEE FOR REFUGEES

ISSUE BRIEF SEPTEMBER 1989

BEST COPY AVAILABLE

This report was written by Bill Frelick. It is based, in part, on a U.S. Committee for Refugees fact-finding trip by staff members Frelick and Hiram A. Ruiz to the Lower Rio Grande Valley, Texas (including Harlingen, Brownsville, Port Isabel, and Laredo) Matamoros, Mexico, and Miami, Florida in April 1989. It was edited by Virginia Hamilton and produced by Koula Papanicolas.

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REFUGEES AT OUR BORDER

THE U.S. RESPONSE TO ASYLUM SEEKERS

"The U.S. screens people in south Texas and holds them in a detention center and repatriates them in one day. They do the same to the people from Haiti on a boat off the coast of Haiti. They pick them up, screen them on board the boat, deny them refugee status, and then push them off. Now why are the Vietnamese different?"
Michael Hanson, Coordinator for Refugees, Hong Kong

Hong Kong has instituted a harsh detention policy and has been widely criticized for threatening to forcibly repatriate those Vietnamese boat people whom it deems to be economic migrants. The U.S. government has declared that it is "unalterably opposed to the forced repatriation of Vietnamese asylum seekers." Yet the question raised by a Hong Kong official to rationalize that government's inhumane treatment of asylum seekers continues to haunt: "Why are the Vietnamese different?"

The United States, by its example, has been the leader in establishing the world's standards for refugee protection. America's adherence to principles of due process; its rescue of more than 800,000 Indochinese refugees in the past decade; its willingness to underwrite financially the largest share of the costs incurred by intergovernmental agencies assisting refugees; its reminders to both allies and foes that the rights of refugees need to be respected, all add up to an unrivaled leadership that has carried weight—political, economic, and moral—that the United States has brought to bear to save lives and to see that justice was done.

However, a longstanding policy of interdicting and returning Haitian boat people—as well as a policy more recently instituted in south Texas of detention, quick asylum adjudication, and deportation for those the government rejects—threatens to erode the moral authority of the United States on behalf of refugees worldwide. Faced with asylum seekers on our own border, our actions no longer match the ideals we espouse.

This report will examine the newest developments in U.S. asylum policy, as well as some of the continuing problems, such as Haitian interdiction. We recommend that readers looking for a fuller discussion of the history and development of U.S. asylum policy refer to two earlier U.S. Committee for Refugees publications: *Despite a Generous Spirit: Denying Asylum in the United States* (December 1986) and "The Back of the Hand: Bias and Restrictionism Towards Central American Asylum Seekers in North America" (October 1988).

BACKGROUND

A Change in Policy to Stem the Influx of Asylum Seekers

The Immigration and Naturalization Service (INS) signalled a major shift in U.S. asylum policy in December 1988 by ordering the expedited adjudication of asylum claims in the INS district in Harlingen, Texas, through which most Central American asylum applicants had been passing upon entering the United States. The policy, in effect, made further travel impossible by requiring that asylum applications be examined at the office where they were first submitted. The essence of the plan was to make quick determinations of voluntary (the technical term is "affirmative") asylum claims on the same day as they were filed. Extra INS examiners and support staff were sent to Harlingen for expedited examination of the applications.

Before December 16, the INS office in Harlingen had allowed asylum applicants filing there to travel onward, so that their cases could be adjudicated at other INS offices, many of which are located in metropolitan areas where the applicants would have vastly improved chances of finding legal assistance and support. The procedure, prior to the change in policy, had been for applicants to affix their fingerprints to the I-589 asylum applications, attach the biographical data form (G-325A), and proceed to their destination within the United States. Fewer than one percent remained in the Harlingen area. More than half traveled to Florida, while others went to Los Angeles, San Francisco, Washington, D.C., Newark, Houston, and other cities, primarily scattered along the eastern seaboard.

The reason given for the change was a dramatic increase in the number of people, particularly Central Americans, applying for asylum in the United States. The Harlingen INS district office reported an average of 2,000 asylum applicants per week in December, compared to 400 to 500 a week in June 1988. This increase was attributed by some, at least in part, to an INS policy shift earlier in the year. Prior to the spring of 1988, asylum applicants in the Harlingen area had been required to remain "in the Valley" for the duration of the determination of their asylum claims. Since being permitted to move onward, from May 30 through December 8, 1988, 27,122 asylum applications were

Border patrol officer processes young woman apprehended in Brownsville. Hiram A. Ruiz

filed in the Harlingen district. Roughly half of those applying were Nicaraguans, a quarter Salvadorans, 12 percent Guatemalans, and 11 percent Hondurans.

An average of 1,000 asylum applications per week were being filed in Miami. The Miami INS district office had a backlog of 50,000 applications, including 35,000 Nicaraguans.

All told, 60,736 asylum applications were filed with INS district directors in FY 1988, as opposed to 26,107 in FY 1987, and 18,889 in FY 1986.

But the number of those voluntarily coming forward to apply for asylum with INS district directors tells only part of the story. Apprehensions by the Border Patrol are another indication of the extent of the influx, and include asylum applicants not counted in the above statistics.

Apprehensions of Salvadorans in FY 1988 increased 46 percent over the previous year. Apprehensions of Guatemalans in FY 1988 increased 38 percent over FY 1987. At the same time, however, apprehensions for all nationalities decreased by 18 percent, including a 32 percent drop for Nicaraguans. The overwhelming majority of apprehensions (94 percent) continued to be of Mexicans.

Those who are apprehended by the Border Patrol do not have the option of applying for asylum before INS district directors, but rather are able only to apply for asylum in the course of deportation or exclusion proceedings before immigration judges. Asylum applications before immigration judges in deportation or exclusion proceedings include both those made by apprehended aliens who opt to apply, as well as by others who have previously applied and been denied by an INS district director, who then renew their asylum applications in the course of deportation or exclusion hearings. Immigration judges received 11,025 asylum cases in FY 1988. Salvadorans represented 4,385 of this number; Hondurans, 361; Guatemalans, 756; and Nicaraguans, 2,325. These statistics are limited to the number of immigration judges who report by computer.

Internal Policy Debate at INS and the Justice Department

The December policy shift had been brewing at least since the departure of former Attorney General Edwin Meese and his replacement by Dick Thornburgh. Officials in the INS and Justice were particularly concerned by the impact of a July 1987 memorandum from Meese which said that Nicaraguans with a well-founded fear of persecution would not be deported, and called for an expedited process for granting work authorization to Nicaraguan asylum seekers. A series of internal INS memoranda in early December called for recision or modification of the Meese directive. On December 2, Associate Attorney General Francis A. Keating wrote a memo to INS Commissioner Nelson entitled "Texas Border Situation." The memo expressed deep concern at reports of large numbers of Central Americans, primarily Nicaraguans, crossing the border near Harlingen, and urged him to take immediate steps to augment the Border Patrol presence to deter illegal entries, and to increase INS examination capability at Harlingen to make on-the-spot adjudication of asylum claims.

Keating said that he would urge "a prompt recision of the August 1987 memorandum" establishing the special Nicaraguan program, which he called "a contributing factor to the current situation."

A memo of December 5 from INS Deputy Commissioner James Buck directed INS staff to marshal arguments "which Keating may use to support the argument for recision of the Meese memo regarding Nicaraguans."

The INS memorandum proposed a series of long- and short-term measures to reduce the number of asylum applicants. In addition to acting upon all asylum requests in the jurisdictions where they are filed (the key

policy change of mid-December), the short-term measures proposed included other changes: reviewing all asylum applications on a last-in, first-out basis; reviewing all asylum applications before granting work authorization; and immediately communicating to INS field offices that "the Meese memorandum of July 1, 1987 [regarding Nicaraguans] does not require automatic granting of work authorization to asylum applicants whose claims are frivolous."

Intermediate actions proposed in the memorandum included: using all possible detention capabilities; increasing border enforcement; requesting the Justice Department to rescind its Nicaraguan deportation review policy; and pressuring the State Department to "secure the assistance of Mexico and Central American countries to slow down the flow of illegal aliens into the United States."

Suggested long-term actions included: charging fees for asylum and work authorization requests; giving INS district directors greater discretion in issuing work authorization; identifying "carefully selected offices where asylum applications will be accepted"; and considering increased refugee processing in Central America. "Seek additional refugee numbers in this area if needed," the memorandum suggests.

The December INS memo listed the expected results and benefits of these proposed changes, such as an overall decline in work authorization, more expedited asylum determination, and a reduction of caseload in Miami, Los Angeles, and San Francisco. The memorandum stated, "The free ride which smugglers and their clients now have out of the Harlingen area will be disrupted, if not stopped."

INS POLICY IN OPERATION

December 1988: The Immediate Impact on South Texas

The immediate impact of the change of policy on the Lower Rio Grande Valley was that the Central Americans, who previously continued to move out of the area, were now stuck with no place to live. The INS policy did not provide for a means to feed or shelter those who would be forced to wait near Harlingen while their asylum applications were pending. Soon after the policy took effect, the numbers of Central American asylum seekers in Harlingen—an economically depressed area on the southernmost tip of Texas—grew. Hundreds were staying in makeshift camps in fields, occupying abandoned buildings, and overwhelming church shelters. Their living conditions became increasingly cramped, uncomfortable, and unsanitary.

Robert A. Wooten, Patrol Agent-in-Charge of the Brownsville Border Patrol sector, who supports the current detention and deportation policy, recalled the situation:

> We were detaining no one. One hundred percent of the OTMs [Other Than Mexicans] were being put on the street. It was depressing to be a law enforcement agent, to see the results of our work walk out the front door. How do we know we weren't releasing criminal elements? It was an unhealthy situation for this country. People were camped in vacant lots and in an abandoned, fenced-off motel. I wasn't proud of what we were doing.

On January 9, the INS policy was stopped by a temporary restraining order issued by U.S. District Judge Filemon Vela. That order freed hundreds of Central Americans to file their asylum applications in Harlingen and move onward to final destinations in the United States, where their claims would be adjudicated.

Judge Vela's order also presented a window of opportunity for Central American asylum seekers; during the period of the temporary restraining order (with the cloud of a stricter enforcement policy overhead), thousands of people rushed forward to apply for asylum. Crowding at the INS office in downtown Harlingen became so bad that city officials responded by evicting the INS from its downtown office, citing violations of health and fire codes. A state district judge, Robert Garza, prohibited the INS from reopening facilities in Harlingen "in such manner as to constitute a nuisance and threat to public health and safety."

The way asylum applications were being filed had the appearance of a feeding frenzy. At the time, there was no control over frivolous applications, and the system clearly was open to abuse. Many of the applications filed at that time were inaccurate or lacking in information upon which an asylum claim could be based; some were even identical, filled out by unscrupulous middlemen. Taxi drivers taking people to the INS office frequently filled out the asylum application forms.

The Central Americans themselves often had no idea that they were applying for asylum. They often thought the I-589s simply represented "permiso" to work and travel. It is likely that among those who filed bad applications were genuine refugees who were not aware of what they were doing and who were never asked questions relating to potential refugee status.

An immigration attorney in Washington, D.C. who agreed to represent a group of Guatemalans from Harlingen discovered after meeting his clients that the information on the I-589s was "identical and totally fabricated." Now, said the attorney, "I need to tell the immigration judge that the whole story is fabricated and explain why my clients signed false asylum applications. It raises a serious credibility question." He said that the

judge is bound to ask why he should believe their stories now, when they already are on record as having submitted false ones. Lawyers in Los Angeles said much the same thing.

Regardless of the abuses of the asylum system that did occur, at least the people who applied for asylum in January and February were able to move on to Miami, Los Angeles, and other places where they would be more likely to find work, have the support of family and friends, and the assistance of legal counsel.

Miami—Melting Pot on the Boil

With the January 9 Temporary Restraining Order, the cork that had created the bottleneck in Texas was popped, and suddenly its contents—mostly Nicaraguans—poured into Miami, setting off a panic reaction in the local community.

Within a 48-hour period, several hundred Nicaraguans arrived in Miami aboard Greyhound buses. The actual average rate of arrival of Nicaraguans and other Central Americans coming into Miami in January was probably not much greater than it had been during the last six months of 1988. But it was more visible, and was seen as a dramatic harbinger of things to come. Officials in Miami, with an estimated 100,000 to 150,000 Nicaraguan exiles (as well as more than 600,000 Cuban exiles and Cuban-Americans), were predicting the arrival of an additional 100,000 Nicaraguans in 1989.

The *Miami Herald*, which in a December 17 editorial had declared INS's new get-tough measures (including increased apprehension and deportation of Nicaraguans and other Central Americans) an "immoral policy," on January 13, ran a lead editorial, "The Crisis Upon Us," which opened:

> Within the next 48 hours, the droplets of Nicaraguans arriving in Miami will become a rivulet. Within days, that rivulet probably will become a torrent. It has the potential of swelling into a tidal wave that would engulf Greater Miami, causing social and economic destruction more severe than any American city anywhere has ever experienced.

In the wake of this widespread alarm over the impending flood of Nicaraguan refugees, the shooting of an unarmed young black man by a Hispanic police officer sparked rioting in Miami's black neighborhoods. The riots represented the boiling over of a host of tensions and grievances, but they were attributed, in part, to resentment in some sectors of the black community to the Nicaraguan influx, and to the reception of the Nicaraguans by the City government.

The shooting and subsequent riots were reminiscent of events in 1980, when the shooting of another black man during a chase (also in the wake of an influx of Hispanic refugees, on that occasion the Mariel boatlift), led to rioting that left 18 dead and 400 injured. While poor relations between the black community and the police force, particularly Hispanic officers, were once again cited among the causes of the rioting, the arrival of the Nicaraguans (during the same week as a boat with Haitian refugees was interdicted and the Haitians onboard returned to Haiti), the assistance offered to the Nicaraguans, and the predictions of a further massive influx were also noted as triggers for the violence.

Exacerbating blacks' resentment of help given to Hispanic refugees is their anger that Haitian refugees do not receive the same treatment. "This community has not dealt fairly with black Americans and Haitians," Dade County Commissioner Barbara M. Carey, co-chair of the Immigration Advisory Committee for Dade County, the County's only black Commissioner, told the USCR team visiting Miami. "I'm not saying that's the cause of the riots, but it contributes to the frustration."

She said, "The black and Haitian communities see the treatment of Haitians as totally unfair and unjust. There are very strained relations between ethnic communities right now. We feel that our government hasn't dealt fairly with black Americans or people from black countries."

The much-publicized arrival of the Nicaraguans on Greyhound buses also precipitated conflict not only between local ethnic groups, but between local governments, as well. The City of Miami, with a Cuban-born mayor and a much higher percentage of Hispanic residents than the county, welcomed the Nicaraguan refugees and sought ways to assist them. The county, however, believed that the City was only encouraging more Nicaraguans to come. County Commissioner Carey said that while the county had no objection to private efforts to help the refugees, she didn't think that the City should take actions that would encourage Nicaraguans to think that they would be taken care of if they arrived in Miami. Both county and city officials were united, however, in pressing the federal government for financial assistance to deal with the influx.

Carey expressed her anger at the differential treatment of Haitians and Nicaraguans by federal authorities. She said that the immigration law needs to be applied fairly and equitably to all groups. "Don't make artificial distinctions." In Washington, she argued that if Haitians trying to enter the country are being detained, why aren't they detaining Nicaraguans? "Our first objective is that they [Haitians and Nicaraguans] all be released to families while a determination on their case is made," said Carey. But, she added, if one group is to be detained, then all groups should be equally detained.

That, in fact, is just what INS is now doing.

Temporary Restraining Order Lifted

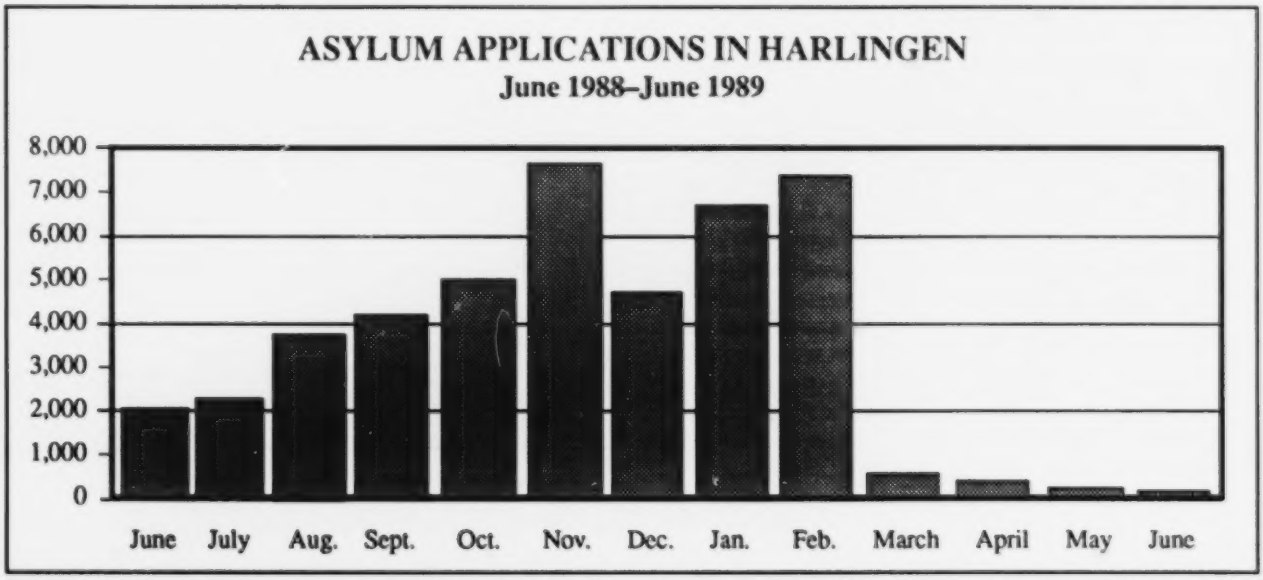
Judge Vela's Temporary Restraining Order was lifted on February 20. On that day, Nelson announced a new procedure for detention and deportation of undocumented aliens arriving in south Texas. Nelson said, "We intend to send a strong signal to those people who have the mistaken idea that by merely filing a frivolous asylum claim, they may stay in the United States. This willful manipulation of America's generosity must stop." Nelson announced that the processing time for an asylum application in the Harlingen district would be reduced to a single day.

The plan unveiled on February 20 called for:

- increased Border Patrol activity, boosted by an increase of 269 Border Patrol personnel;
- expeditious processing of asylum applications at the port of entry, marked by an increase of 74 INS adjudicators and support staff in south Texas plus a detail of about 141 additional INS, State Department, and Executive Office of Immigration Review staff;
- issuance of OSCs [Order to Show Cause—contains the factual allegations and the charges against the alien and initiates the deportation process for denied asylum claims; in it, the alien is required to show why he or she should not be deported], and, where applicable, WAs [Warrant of Arrest—written authorization to take an individual into custody];
- the detention of undocumented aliens arrested in the Lower Rio Grande Valley pending a determination of their asylum claims and completion of deportation proceedings, to be detained in INS facilities, or held in custody in other facilities in conjunction with other federal agencies;
- prompt hearings before immigration judges for the aliens to respond to the OSCs and to be given the opportunity to apply for or renew their applications for asylum, and to seek redetermination of the amount of bonds, as well as conditions for release on bond.
- deportation for those found ineligible for asylum or other forms of relief.
- making available additional detention space in INS facilities in south Texas.

An INS document, "Enhancement Plan for the Southern Border," on February 16, outlined "objectives" and "tactics" of the plan that would be unveiled later that week. The INS was aware of the public relations side of the effort. The plan stated, "Mount an aggressive, proactive information campaign for the media, general public, and Congress, both before and during enhanced operations in south Texas. Make a clear case against entry without inspection, even when followed by a claim for asylum." The deterrent aspects of the INS plan had to be weighed against possible negative public reactions. "Maintain detention sites which are secure, yet sensitive to harsh public scrutiny."

There was another component of the plan, however, that the INS had no intention of making public—the use



Note: Only a few asylum applications were actually filed in Harlingen between June and December 1988—an average of 38 per month. The statistics in this graph for that period represent the number of people who entered at Harlingen and picked up asylum applications, but who were allowed to file them at other INS offices in the United States. Starting in January 1989, the statistics in this graph reflect the number who actually filed their asylum applications in the Harlingen district. The drop in affirmative applications in March reflects the renewal of the detention and deportation policy, when applications had to be filed at the Port Isabel detention facility.

Source: Immigration and Naturalization Service

of asylum applicants as a source of intelligence on home country conditions. The document said, "A team of debriefers composed of special agents from the Harlingen District, Intelligence Officers, Intelligence Analyst(s) and clerical support will be on site at the processing locations. These personnel will develop information on routes, availability of exit visas, the applicants' perspectives on conditions in source countries, major factors influencing their decisions to leave, socio-economic conditions, etc." The document said that information collected by the INS would be shared particularly with the CIA, the Defense Intelligence Agency, and the Department of State. No thought was expressed in the memo to the possible repercussions for the asylum seekers of the INS giving to U.S. intelligence agencies information asylum seekers provide in confidence to establish their refugee claims, nor on the chilling effect the knowledge of such information sharing could have on their willingness to speak forthrightly about their experiences and fears.

The Asylum Adjudication Process

A month after the INS plan had been in effect, U.S. Committee for Refugees staff traveled to south Texas to survey a cross-section of facilities that detain or shelter Central Americans in INS proceedings in order to learn about the process Central American asylum seekers undergo and to assess conditions of detention and the impact of the INS policy on asylum adjudication. USCR interviewed both those responsible for running each of the facilities visited, as well as the Central Americans in them. USCR also observed deportation hearings at Port Isabel and Harlingen.

On paper, the asylum adjudication process set up by the Harlingen INS district office to determine affirmative asylum claims appears to be both quick and thorough. The reality, however, does not extend far beyond the appearance because almost no one in south Texas is voluntarily applying for asylum.

Aliens stepping forward to apply for asylum affirmatively dropped from 450 to 500 a day in January to less than 10 per day in May. The day prior to the USCR visit to the INS office in Harlingen, only 2 applications had been received. Between February 21, when the program started, and August 1, a total of 886 Central Americans had applied voluntarily for asylum, two-thirds of whom were Nicaraguans. Nicaraguan asylum applications were approved at a rate of 18.6 percent. Approval rates for the other Central American nationalities continued to lag, with the percentage of approvals for Salvadorans, Hondurans, and Guatemalans standing at 3.6, 1.4, and 0 respectively. These statistics apply only to affirmative asylum applications filed in the Harlingen district since the lifting of the temporary restraining order; they do *not* include applications filed with immigration judges in the course of deportation proceedings.

Affirmative applications are now examined on the grounds of the remote Port Isabel Service Processing Center, a compound that houses a large detention facility, and courtrooms for hearings before immigration judges. It is also the place for the filing of affirmative claims with the INS. Any person wanting to apply for asylum must now find his or her way to this out-of-the-way location, about 25 miles from Harlingen. More daunting is that the person going to apply for asylum must present himself at a compound that, to all appearances, is a prison. Although the INS adjudications office — consisting of a trailer, a tent, and a temporary-looking building—is just outside the actual prison fences, it is clearly on the same grounds. When approaching the facility, one first sees two parallel chain-link fences topped by barbed wire, and patrolled by guards circling the periphery on motorcycles.

During the USCR visit, none of the INS examiners was engaged in asylum adjudications. A large tent ready to accommodate the affirmative applicants stood nearby, almost empty.

The pace is much different just yards away, where immigration judges from the Executive Office of Immigration Review (EOIR) have their offices and conduct deportation hearings of twenty or more Central Americans at a time. Immigration judges conduct deportation proceedings, and can consider asylum requests in the course of those hearings.

USCR observed one group of 22 Central Americans–Hondurans, Salvadorans, and Guatemalans, but no Nicaraguans—in their first and, as it turned out, only hearing prior to deportation.

Crammed into a small cinder-block room, the detainees in their bright orange prison uniforms watched as the judge, in black robes, leafed through files and spoke into a tape recorder. None of the detainees was represented by legal counsel. The judge asked, "If it is necessary for me to order you deported, to which country would you wish to be sent?" Each person stood as his name was called and named his country. The judge asked each, "Is there any reason why you cannot be returned to . . . ," and then he again sorted through files trying to match the name of the country with the name of the individual. Each answered, "No".

After explaining the option of voluntary departure, the judge asked, "Is the reason you do not apply because you do not have enough money to return home?" Each person answered, "Yes".

The judge then ordered them all deported. He told them that they had the right to appeal to a higher court if they thought his decision was unjust. "Do you all waive

your right to appeal?" he asked. One man said, "I don't understand." The judge repeated that "you have the right to appeal to a higher court." The man fell silent as the group in unison waived their right to appeal.

Afterwards, the judge told USCR that this was the only hearing for these aliens. He said that he had not advised them of their right to apply for asylum because each had named his home country as his preferred country of deportation, proving that none of them had a fear of persecution.

Hearings in downtown Harlingen contrasted dramatically with those in Port Isabel. The Harlingen hearings, involving family groups from the Red Cross shelter in Brownsville, were individualized, not rushed, and the judges clearly tried to ask open-ended questions about fears of persecution.

For example, a Nicaraguan woman and her 5-year-old son came before one of the judges in deportation proceedings. He asked, "Are you afraid?" She answered, "Yes, I am afraid for my young son." "Why for your child?" he asked. "Because they pursue little boys, take them in the military. They say they will take him by the age of 10."

Even though he said that the articulated fear appeared to be at least five years off, the judge said to the woman, "If you apply for asylum, I will assist you in every way."

He directed the court clerk to give her an I-589 asylum application form and gave her a continuance of two weeks to fill it out and seek legal counsel.

Although none of the Central Americans we observed in downtown Harlingen was represented by legal counsel, the several judges operating there all attempted to communicate fully and clearly with them about their rights and options. None of these aliens named their home country as the country to which they would be deported; none waived any of their rights.

DETENTION

Prisons Versus Shelters

The single factor that determines whether a person is incarcerated at Port Isabel or taken to the Red Cross Shelter is whether or not the person is traveling with his or her children. Single people, or spouses without children, are detained at Port Isabel.

The Red Cross shelter in Brownsville has a relaxed, even a cheerful atmosphere. (A new shelter opened in San Benito shortly after our visit, and another was being contemplated to open later in Hidalgo County.) People wear street clothes and are free to wander about Brownsville during the day. Children play. Red Cross volunteers from around the country lend an atmosphere of welcome and camaraderie. Although the accommodations were simple, and had a temporary feel, no one was complaining.

The contrast with Port Isabel is striking. One is a prison; the other a shelter. Port Isabel is surrounded by double rows of high fences topped by barbed wire; detainees are marched in lines from place to place; they wear bright orange prison uniforms. Even more striking, however, is the critical difference that placement in one or the other facility has on legal access and, ultimately, on deportation. While INS staff at Port Isabel said at the time of the USCR visit that up to 120 people per day were being deported from there, the Red Cross staff in Brownsville said that they were not aware of a single person from their shelter having been deported. A Justice Department official with the Community Relations Service in Brownsville confirmed that was the case.

A trailer with private attorneys and paralegals offering free legal aid sits on the grounds of the Red Cross shelter. At Port Isabel, it is a struggle for the detainees to locate legal counsel, and even for attorneys and

Prisons versus shelters: Port Isabel is surrounded by double rows of high fences topped by barbed wire; detainees are marched in line from place to place; they wear bright orange prison uniforms. Hiram A. Ruiz

Shelters versus prisons: A Central American family in the comparatively relaxed atmosphere of the Red Cross shelter in Brownsville, where people wear street clothes and are able to visit the city during the day. Hiram A. Ruiz

paralegals to see the clients who have managed to contact them.

The staff of Proyecto Libertad—the only organization in the area that gives free legal assistance to aliens in INS proceedings and that has been involved in litigation against INS practices—said that they frequently travel the long distance to Port Isabel, present a list of 10 names to the authorities, and wait for hours. Sometimes, a few people are located; sometimes, none.

The director of the Port Isabel facility, Cecilio Ruiz, said, "We have done all we can to accommodate the attorneys." However, he said, "I will protect [the detainees] against attorneys who want to take their money and give them wrong information."

Of the detainees, Ruiz said, "They are all undocumented aliens. They all violated the law. They entered the U.S. illegally, period." He said, "My experience has been, in the files I have read, they are coming here for economic reasons."

The prison atmosphere at Port Isabel was underscored by some of Ruiz's other comments. For example, in distinguishing the treatment of family groups at the Brownsville Red Cross shelter from the detention of adults at Port Isabel, Ruiz said, "I don't make war on children. I don't want children detained here. And I don't like to detain women."

But Port Isabel does detain women, and Ruiz mentioned that "some of the women are on the edge." Couples without children at Port Isabel have complained that it is difficult for spouses to see each other.

Access to telephones—essential for detainees to be able to contact lawyers—was limited. The Port Isabel authorities said that efforts were being made to install additional telephones—part of the requirement of the *Orantes-Hernandez* injunction, stemming from a class action suit brought by Salvadorans in INS custody—but at the time of the USCR visit, we saw long lines at every telephone accessible to the detainees. Other telephones that guards indicated were for detainee use appeared to be inaccessible to them.

The Isolation of Webb County Detention Center

If legal access is difficult for Central American detainees in Port Isabel, it is well nigh impossible for detainees in the Webb County Detention Facility. Laredo basically has two private attorneys—one of whom moved to Laredo in May—and one accredited paralegal who are available to represent Central Americans and other asylum seekers. Their practices are limited almost exclusively to reducing bonds, which are among the highest in the country. Bonds for Central Americans

generally are set at $7,500, and for South Americans, Haitians, Sri Lankan Tamils, or asylum seekers of other nationalities at $20,000.

Located in a remote area outside Laredo, the Webb County Detention Facility, like Port Isabel, is a prison. Surrounded by a barbed wire fence and guard towers, the detainees are normally given only one hour per day of recreation time, five days a week, according to one of the guards. They are not given time in the recreation yard from noon on Friday until Monday morning. The detainees are further locked behind bars within the barracks, with television as their only visible source of recreation. The detainees are locked away from the single telephone that stands in the center aisle of the barracks. As the USCR team walked down the center aisle of one of the barracks, detainees crowded against the bars on all sides pleading for help. While most of the pleas were for legal assistance, others asked for toothpaste. It had been 25 days since they had had any.

A Salvadoran whom we interviewed at random, and who is supposedly protected by the *Orantes-Hernandez* injunction, told us that he had not had access to paper or pencils for the duration of his detention. He also said that there is little time for calls and that "the police cut off the calls."

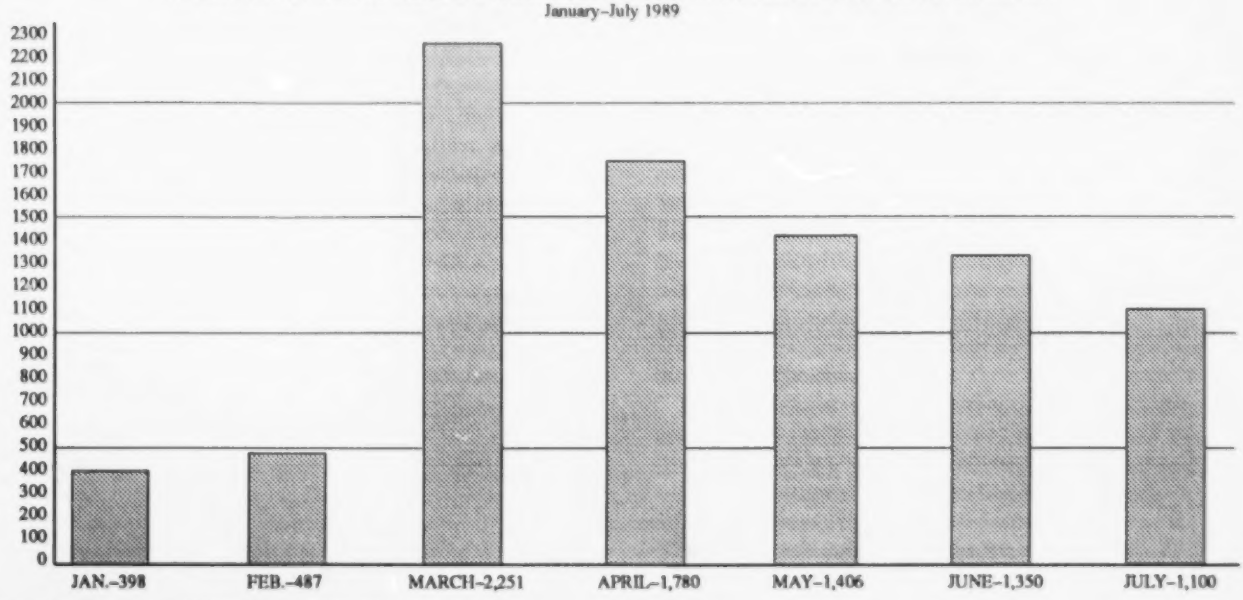
The Salvadoran said that there are long delays between hearings before immigration judges. He said that many have been waiting for so long that they want to be deported. He estimated that was true for about 40 people in his barracks. Local service providers confirm that no immigration judges are posted permanently in the Laredo area, but that two judges come from San Antonio twice a month for about three days, resulting in long delays for detainees who do seek legal remedies.

We asked the Salvadoran whether he had been notified of his right to apply for political asylum. He said, "They only asked me if I came with a smuggler." The Salvadoran then added, "When they gave the papers, they said, 'Sign here, sign here, sign here.' A uniformed person asked how many kids I have, about my wife, my work, birthdate, school, religion. He did not ask me why I left. The only thing he explained was the list of attorneys."

Under the *Orantes-Hernandez* injunction, the INS is required to provide a list of free and low-cost legal services. We were told by detainees and by local volunteers and service providers that the problem everywhere, but especially in Webb County, is that very few of the organizations listed actually help aliens in deportation proceedings. The list provided to detainees in Webb County includes several agencies that do not accept collect calls, including Texas Rural Legal Aid, which is prohibited by law from representing undocumented aliens. One service provider called the list "a complete fraud."

The Salvadoran detainee said that he had been forced into the civil guard in El Salvador, but that "a few days later, they told me to disappear." We asked who "they" were. He said he had received an anonymous note telling him not to do the service. This was in October 1988. He fled shortly afterwards. He also said that his daughter had been kidnapped and held for ransom, but he wasn't sure whether the kidnappers were politically motivated or not.

AVERAGE NUMBER OF ALIENS IN DETENTION PORT ISABEL SERVICE PROCESSING CENTER
January–July 1989



Source: Immigration and Naturalization Service

Central American man detained at Port Isabel ponders an uncertain future. Hiram A. Ruiz

He was being held under a $5,000 bond. "The judge told me I could be deported for free, otherwise I would have to pay."

CCA Contract Facility in Laredo

At the time of our visit, Port Isabel was holding 2,184 detainees; the Red Cross Shelter, 925; and Webb County, an average of 350. The smaller Correctional Corporation of America (CCA) facility at Laredo was holding an average of 290 persons. Although contracted to the INS, the CCA facility operates somewhat differently from the INS facilities. Detainees wear street clothes, rather than uniforms. They are still locked up, however, and we observed several detainees in solitary confinement. We observed one room holding unaccompanied minors. None of the youths appeared to be doing anything other than sitting. Detainees at the CCA complained about the food, and the recreational facilities were as bad or worse than Webb County. The small recreation yard, which was not being used at the time of the visit, was dirty, rocky, and dusty. It featured a single basketball hoop, about 15-feet high. Two battered balls sat on the ground.

Since our visit, unaccompanied minors have been transferred out of the CCA facility.

Showcase Shelters for Unaccompanied Minors

In contrast to the treatment of children in the remote CCA facility at the time of the USCR visit, unaccompanied minors who had the relative good fortune of being apprehended in the Brownsville sector were being housed in shelters run by International Educational Services (IES) under contract with the Justice Department's Community Relations Service. Although time did not permit a USCR tour of either of the IES facilities, local service personnel generally gave those at Los Fresnos and Raymondville high marks. A new, larger shelter for unaccompanied minors that has started operation in Mission has been criticized for being less equipped to handle its larger population of unaccompanied youths than the two older, smaller facilities. The Mission facility has a capacity for 80; Raymondville and Los Fresnos hold 48 and 35, respectively.

Proyecto Libertad on several occasions protested treatment of unaccompanied minors in deportation proceedings. Particular charges were leveled about rough treatment in the transport and holding of children for appearances at immigration courts. These included allegations of the use of shackles and handcuffs, infrequent meals, and temporary housing of minors in the guards barracks of the Port Isabel facility. After protests were lodged, improvements have come about. Minors are now generally taken to the Harlingen immigration court—not Port Isabel—and see one judge who is known for his sensitivity in dealing with children. The INS has been encouraging private efforts to find foster care alternatives to detention for unaccompanied minors.

Even with a sympathetic judge, however, unaccompanied alien children, like their adult counterparts, are not considered to have a constitutional right to court-appointed lawyers. In virtually every other legal context in the United States, children are appointed legal representation. But when seeking asylum and fighting deportation, despite the potentially dire consequences of denial, alien children are left on their own.

Orantes-Hernandez: A Stopgap Order to Prevent INS Abuses

Finding that "a substantial number of Salvadorans who flee El Salvador possess a well-founded fear of persecution," a federal judge on April 28, 1988

concluded that they are eligible to apply for asylum, but that "the vast majority of Salvadorans apprehended sign voluntary departure agreements which commence a summary removal process." The judge, David Kenyon, ordered a permanent injunction against the INS to prevent the agency from coercing Salvadorans to abandon their asylum claims.

The class action, *Orantes-Hernandez v. Meese*, was brought on behalf of all Salvadorans in the United States who have been or will be taken into custody by the INS. The widespread acceptance of voluntary departure, the court concluded, is due in large part to the coercive practices of the INS combined with the unfamiliarity most Salvadorans have of their rights under U.S. immigration laws. Those practices, the court found, include giving improper and incomplete legal advice about asylum, suggesting, among other things, that Salvadoran applicants will face long detention, that information from the asylum application will be sent back to El Salvador, and that if they apply, their applications will be denied anyway.

Judge Kenyon determined INS processing of detained Salvadorans to be "inherently coercive and often deliberately intimidating." The court noted that as a general practice, "INS knowingly locates its major detention facilities in communities with little or no legal representation available to indigent detainees." In transferring Salvadorans to remote and isolated areas, the court found that detainees "have been deprived of food and kept incommunicado for extended periods of time."

Conditions of detention include total or partial bans on writing materials, restrictions on telephone use, daily announcements of the availability of voluntary departure (without notifying detainees of other rights), limiting daytime visiting hours with attorneys, distributing inaccurate legal services lists, and placing detainees in solitary confinement without a hearing under the guise of administrative segregation.

The court found that the "INS engages in a persistent pattern and practice of misconduct which deprives plaintiff class members of their constitutional right to due process and statutory right to apply for political asylum and withholding of deportation."

"INS agents used a variety of techniques to procure voluntary departure," wrote Kenyon, "ranging from subtle persuasion to outright threats and misrepresentations. Many class members were intimidated or coerced to accept voluntary departure even when they had unequivocally expressed a fear of returning to El Salvador."

After documenting a litany of coercive policies and practices in every phase of INS dealing with Salvadorans in its custody, Judge Kenyon noted,

> The record before this Court establishes that INS engages in a pattern and practice of pressuring or intimidating Salvadorans who remain detained after the issuance of an OSC to request voluntary departure or voluntary deportation to El Salvador . . . This conduct is not the result of isolated transgressions by a few overzealous officers, but, in fact, is a widespread and pervasive practice akin to a policy . . . This pattern of misconduct flows directly from the attitudes and misconceptions of INS officers and their superiors as to the merits of Salvadoran asylum claims and the motives of class members who flee El Salvador and enter this country.

The court's injunction required the INS "not to employ threats, misrepresentation, subterfuge or other forms of coercion, or in any other way attempt to persuade or dissuade class members when informing them of the availability of voluntary departure."

During the USCR visit, INS personnel made frequent references to the *Orantes* injunction. Alfonso De Leon, assistant director for examinations at Port Isabel, said, "We knew we would be under a magnifying glass, and that we could be challenged." In fact, at that very time, in Los Angeles, the INS was being challenged for violating the *Orantes* injunction.

As a result of that challenge, Judge Kenyon issued another injunction against the INS requiring that Salvadorans be advised of their rights before being deported. In taking this action, Kenyon determined that the INS had violated his previous order requiring that Salvadorans be informed of their rights to be represented by an attorney and to apply for political asylum.

Judge Kenyon found that various Salvadorans represented in the class-action suit "indicated that they have not had access to telephones to contact an attorney, that they have not seen the videotape prepared by defendants [the INS], and that they were neither given nor read the *Orantes* advisal."

Kenyon further found that,

> . . . as an indication that detainees are not being informed of their rights in any meaningful manner, the Court has learned that, out of a group of 67 Salvadorans deported from Port Isabel Service Processing Center on April 20, 1989, *none* were represented by counsel in their deportation hearings. The Court finds it difficult to believe that each of these individuals learned of and knowingly and effectively waived his or her right to counsel.

Judge Kenyon's preliminary injunction required the INS to arrange for group legal rights presentations to be given immediately by attorneys and paralegals to all Salvadorans detained at the Port Isabel Service Processing Center; restrained the INS from limiting the content of the presentations informing detainees of their rights; and prohibited the INS from deporting or moving ahead with deportation proceedings against Salvadorans "until they have been given the opportunity to receive legal rights information through such orientations."

Haitians interdicted at sea by the Coast Guard. Since 1981, only 6 Haitians out of a total of 20,421 interdicted have been brought to U.S. shores to pursue their asylum claims. U.S. Coast Guard

INTERDICTION AND DETENTION OF HAITIANS

Due Process Circumvented

While litigation, such as *Orantes-Hernandez*, has been brought to bear to protect Salvadorans, legal challenges have not proven especially effective in defending Haitian boat people. This is because interdiction takes place in international waters, outside the jurisdiction of U.S. courts.

A lawsuit challenging the interdiction program, *Haitian Refugee Center v. Garcey*, was dismissed in January 1985 by U.S. District Judge Charles R. Richey, who said, "Because the interdiction program . . . occurs outside the jurisdiction of the United States, neither the statutes nor the treaty upon which the plaintiffs rely can provide any relief." In effect, Richey concluded, "the Executive *can* avoid the obligations by interdicting the Haitians on the high seas." He said, "Although the actions of the plaintiffs, and their representatives, are commendable, and stem from the highest form of humanitarian concern, the Court cannot allow its sympathy for the plight of the Haitians to blind it from the law."

Although the south Texas detention policy garnered a great deal of publicity, and the American public—even outside Texas and Florida—has a general awareness of Central American migration and some of the political bases for that movement, the flow of Haitians and their interdiction by the United States has remained largely hidden. Those outside Florida who are aware of the interdiction program generally think of it as a program of the early 1980s, associating it with the era of the Mariel boatlift. Yet, the interdiction operation is more active than ever. Since the inception of the program in 1981, the largest monthly totals of Haitians interdicted are now being recorded.

In March, 1,535 Haitians in 17 vessels were interdicted and returned to Haiti, the largest monthly total in the eight-year history of the interdiction program. On March 26, the largely unreported interdiction program broke briefly into the news as a result of a dramatic stand-off between a group of 250 Haitians on a 50-foot sailboat and five Coast Guard cutters. The stand-off continued for 30 hours until the Haitians, seeing their situation to be hopeless, surrendered. They were promptly returned to Haiti.

As of April 20, the number of Haitians interdicted in 1989 was 2,373. An INS spokesman attributed the sharp increase to "false rumors" in Haiti "that the Bush administration would allow everyone to stay here who arrived within a 90-day period." The INS spokesman said, "Obviously, someone confused the issues when there was so much publicity about the Nicaraguans" arriving in Miami via south Texas.

The increase in the flow of Haitian boat people has led the Coast Guard to add a second cutter on permanent patrol between Haiti and Cuba and to fly two surveillance planes off the Florida coast as well.

Perry Rivkind, the Miami district director of the INS, told the *Miami Herald* that this was "the heaviest movement of Haitians to the U.S. since I've been the district director for the past six years." And, in a change from the INS refrain for years that all interdicted Haitians are economic migrants plain and simple, Rivkind connected the increase to political upheavals in Haiti as well as to the magnet attraction of the Haitian community in Miami.

Although the increase in Haitians attempting to flee their homeland in the spring of 1989 has been especially sharp, there has also been a steady annual increase in Haitians interdicted since the program began in 1981.

The total interdicted in 1988, 4,712, represented a 33 percent increase over the 1987 number of 3,541.

Virtually all interdicted Haitians are returned directly to Haiti following brief immigration hearings aboard the Coast Guard vessels. INS examiners aboard the vessels interview the Haitians to determine whether they have a legal basis—including a basis for an asylum claim—for entering the United States. Since 1981, only 6 Haitians out of a total of the 20,421 interdicted have been brought to U.S. shores to pursue their asylum claims.*

Those apprehended on the high seas are denied any access to lawyers or any appeal of the INS officer's decision. The "interviews" have often been conducted with groups, instead of confidentially with individuals. A representative of Haiti—by some reports, uniformed Haitian naval officers—is on board the Coast Guard vessels, keeping a watchful eye on the proceedings. The interdicted Haitians are often dehydrated, hungry, and exhausted. They have no idea about the purpose of the hearings, not even knowing what an asylum hearing is. Even assuming that they did understand the proceedings, they are not given an opportunity to document and explain their asylum claims.

Testifying before a congressional hearing on Haitian interdiction on June 8, Jocelyn Mc Calla, executive director of the National Coalition for Haitian Refugees, presented sworn affidavits from Haitians who had been interdicted and returned to Haiti. The affidavits showed people who had experienced past persecution and who had clearly articulated fears of persecution in Haiti, yet who were returned directly to Haiti without having been given an opportunity for a hearing of their asylum claims on U.S. soil. One of those affidavits read:

> Even though we did not organize many of these demonstrations, we took part in them. Thinking that we were the leaders, the government often tried to bribe us, and regularly sent military envoys to threaten us and our children with death . . . On December 8, 1986, the army arrested me . . . I spent two days in jail before they released me . . . But the troops would not let me live in peace. On July 2, 1987, troops went into Raboteau and started firing with little care for the lives of children, women, and the elderly . . . They raided my house, and ransacked it. In addition, they raped my [common law] wife. On September 9, 1987, the government again sent its troops to arrest us. We went into hiding . . .
>
> Finally, after all our struggle to change the country and the prospect that the authorities could murder us at any time, we decided to risk our lives at sea. I and many others organized a voyage on September 12, 1988, one day after the massacre perpetrated by the Namphy regime and paramilitary death squads in St. Jean Bosco church, in Port-au-Prince . . . However, the [U.S.] immigration inspector who interviewed me declared that since there was a new government, they will return me to Haiti. They refused to admit that I had a good reason to leave Haiti and that death threats were still hanging on my head.
>
> The U.S. Coast Guard returned me and the others to Haiti. Since my return, I have been forced to move from house to house, never sleeping in the same place, in order to ensure that the army never learns of my whereabouts and arrests me.

Krome Detention Center

The day of the USCR visit to the Krome Detention Center, an INS facility located on the edge of the Florida Everglades, was unusual in several respects. The day before the visit, a boatload of Haitians had landed on the Miami shore, so that Krome was seriously overcrowded (with 748 detainees in a facility with a capacity for 525; about 550 of the detainees were Haitians). On the day of the USCR visit, a major fire in the Everglades caused Krome to be evacuated.

It would be reasonable to infer that recreational activities were curtailed in preparation for the evacuation, and that detainees were being confined more closely than usual. During the visit, we found most of the detainees sitting on their cots doing nothing. There was no activity in the recreational yards. None of the detainees in the barracks was seen to have any educational or recreational materials, except for one group of men who appeared to be playing a card game, and a group of women who were watching the television in their barracks. Ping pong tables and exercise equipment stood unused. A bank of telephones in the men's barracks was blocked off by a chain-link fence, which was padlocked. Times for telephone use were posted on the locked door of the fence. At the time of the visit, shortly after 11:00 a.m., the schedule indicated that the phones should have been available. However, they were locked and inaccessible to the detainees.

Krome Center Administrator Constance K. Weiss said that detainees usually spend most of the day in the recreation yard, and that Krome features classes and recreational programs. She said that Krome detains neither family groups nor minors, and that all of the detainees are administrative, rather than criminal, cases.

Weiss said that Haitians generally comprise about half of the total population, the remainder made up mostly of South and Central Americans. She said that only about 5 percent of the personnel there speak Creole. Weiss said that the average length of stay is 3-to-4 weeks, with the quickest turn-around being one week and the longest

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* *Those who evade the Coast Guard and reach U.S. territory, or who arrive by air, have a better chance of* applying *for asylum, but still only a very remote chance of actually* being granted *asylum. Of the 1,749 cases that have been decided by INS district directors from June 1983 through September 1988, only 2 percent have been approved. Nevertheless, larger numbers than usual have managed recently either to elude the Coast Guard and reach the Florida shores or enter the United States by air.*

length of stay being 8 months. An average of 450 detainees are housed at Krome at any one time.

But Krome remained overcrowded throughout April and May. As a consequence, tensions continued to rise, and, by May 11, Krome was in "lockdown," and a 70-member riot squad was deployed to keep order. Detainees were segregated in eight separate areas of the facility, and all telephones for detainee use were shut down. One of the detainees filed an affidavit on May 18 stating,

> We must remain in our locked dorms most of the day. At meal times, the guards come to get us armed with clubs. We are made to run to the cafeteria, eat quickly, and run back to our dorms. We can go to the bathrooms only when the dorm doors are opened. We have had no access to telephones to call our families or anyone else since Thursday afternoon, May 11, 1989.

On May 11, the INS began transferring 57 Haitian women from Krome to a rural jail in Cottonport, Louisiana. Shortly thereafter, Haitian men from Krome were transferred to Oakdale, Louisiana and to the Port Isabel, Webb County, Laredo CCA, and El Paso facilities in Texas. The Haitian Refugee Center in Miami sued the INS, charging that their transfer to a remote location deprived them of their rights to access to legal counsel. The complaint stated, "There are no Creole interpreters and no experienced immigration lawyers or family to assist them at these locations." Under the terms of a settlement reached on June 30, the INS was required to return the Haitians who had been transferred in May to Louisiana and Texas back to Miami.

REFLECTIONS ON U.S. ASYLUM POLICY

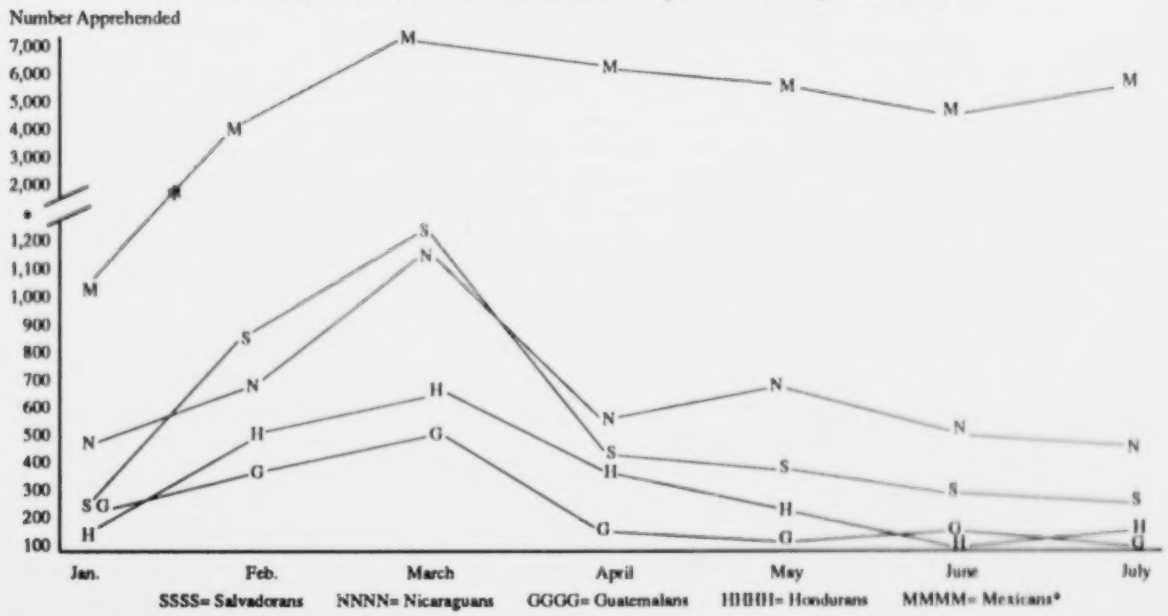
The Fallacy of Treating Asylum as an Immigration Problem

All too often, refugee status determination at or near U.S. borders has little to do with a reasoned and careful consideration of the conditions people have fled and the situations to which they would be returned, but rather with a host of factors peripheral to the essential question of refugee determination—that of a person's well-founded fear of persecution. Factors that relate to one's immigration status—whether or not the person has valid travel documents, for example—consistently outweigh factors relating to refugee status in the INS's treatment of asylum seekers, and, ultimately, in the determination of their asylum claims. *This happens despite the Refugee Act of 1980, which states that asylum claims will be considered "irrespective of such alien's [immigration] status."*

In drafting the Refugee Act, Congress recognized that refugees often have good reason for being undocumented—because of fear of persecution at the hands of their own governments, many have fled

BORDER PATROL APPREHENSIONS BY NATIONALITY

McAllen Sector (Lower Rio Grande area of Texas, including Brownsville/Harlingen) January–July1989



**Note: Scale changes, reflecting increments of thousands, not hundreds*
Source: Immigration and Naturalization Service

without the usual passports and visas. But the focus of the INS is not especially trained on the Refugee Act, or the reasons for the Act's special treatment of asylum seekers. The INS is mandated to uphold all the immigration laws of the United States, and the protection of undocumented asylum seekers in the Refugee Act is truly an exception—a legitimate and humanitarian one—to the general thrust of immigration enforcement.

In seeing their role as the enforcers of our nation's immigration laws, INS personnel consider their primary task to be the prevention of unauthorized entry into the United States and the removal of persons not legally entitled to be here. The entry of persons without valid travel documents, especially those who attempt to evade detection and live and work in the United States without permission, is seen as a direct challenge and threat to the purposes of the agency. The deterrence of "illegal aliens" becomes all the more a priority to the immigration service when there is a perception, widely held both inside and outside the INS, that the United States has "lost control" of its borders and has been faced with a "flood" of would-be illegal immigrants.

There is well-ensconsed and often-expressed belief within the INS that would-be illegal immigrants will use any means available to circumvent or abuse orderly immigration procedures, and that applying for asylum is nothing but a shortcut to jump to the head of the immigration queue. Former INS Commissioner Alan C. Nelson railed against "asylum abuse as a technique for fraudulent manipulation by those who would twist our generosity into personal gain." The presumption evident at every level of the INS—with some noteworthy individual exceptions—is that asylum seekers from countries in our own hemisphere are overwhelmingly economic migrants and that their claims to refugee status are, with few exceptions, baseless.

In reality, the INS fulfills its own prophecy that Central Americans and Haitians are economic migrants by not treating them as anything else, and by turning a deaf ear to those who might be able to tell their stories if given a real opportunity to do so. More often than not, the actual merits of asylum seekers' claims become relegated to the bottom of the considerations U.S. immigration authorities use to determine their reception. Instead, a host of other factors usually come into play that draw the energies of both the asylum seeker and the government onto what are essentially immigration—not refugee-status concerns. These include:

- the date the person entered the United States, and the policy in effect at that point in time;
- where—as in which INS region and district—the alien entered or attempted to enter;
- whether or not the person has valid travel documents;
- the alien's age—being older or younger than age 18;
- whether or not the alien has money;
- whether the person traveled alone or with children;
- the alien's country of origin, and its relations with the U.S. government (coming from Nicaragua rather than El Salvador, or Cuba rather than Haiti);
- how the person traveled here—by boat, plane, or overland;
- whether the alien has relatives or friends in this country;
- whether the alien had access to legal help or received correct legal information, or whether the person bases his or her decisions on false or incomplete information; and
- whether the person was caught by the Border Patrol or voluntarily applied for asylum.

While the disparities in the INS treatment of similarly situated individuals is striking, the overall impression is that few are treated well. The overwhelming majority of aliens currently incarcerated by the INS and facing deportation have no legal representation whatsoever. Among those interviewed by the USCR team, very few showed even a basic knowledge of their rights to apply for asylum, and most seemed fatalistic and passive. Barriers to communication with legal representatives were evident, and it was clear that many did not see the point in trying to overcome these obstacles, with the result that the authorities frequently never heard their stories.

Among the Nicaraguans, Hondurans, Guatemalans, and Salvadorans in INS detention in south Texas whom USCR interviewed, we found people whom we would have judged to be refugees, as well as others who did not appear to meet the refugee standard. We do not suggest that every Central American or Haitian who comes to the United States is a refugee. Nor do we oppose asylum adjudication per se. We recognize the validity of immigration controls.

On the other hand, we came away convinced that Central Americans and Haitians face a *presumption of ineligibility* for refugee status by U.S. immigration authorities. This presumption leads to politicized practices that make it next to impossible for even the most deserving of asylum seekers to wend their way through the asylum process successfully. At a minimum, it appears that Central American and Haitian asylum seekers are being held to a higher standard for determining refugee status than the law requires. In effect, they are being required to establish proof of past persecution and a clear threat of future persecution if returned, rather than a "well-founded fear"—the subjective fear of persecution a reasonable person would feel based on objective conditions in his or her homeland. As was noted by the U.S. Court of Appeals for the Ninth Circuit in *Matter of Arteaga*, the Board of Immigration Appeals—and by extension, the INS—might pay "lip service" to the "well-founded fear

of persecution" asylum standard affirmed by the U.S. Supreme Court in its *Cardoza-Fonseca* decision, but, in reality, the government's use of "boilerplate language" and "magic words" fails to apply the meaning of those words in deciding actual asylum claims.

For those entering the United States who may harbor just such legitimate fears, but who are not aware of the right to apply for asylum or of the very specific criteria used in determining asylum claims, our government offers little or no guidance about how to navigate this arcane and complicated system. Most are left to their own devices. During deportation proceedings, whether or not they stumble on the magic words that will open up the avenue of relief from possible persecution seems to rest on luck, sophistication, and personal resourcefulness. An unlucky, unsophisticated, or unresourceful person with a legitimate asylum claim stands little chance of being heard.

Persecution and Civil Strife

The vagaries and personal biases of individual immigration judges and INS examiners concerning the crucial legal standard for asylum—what constitutes a "well-founded fear of persecution"—are unlikely ever to be overcome completely. However, a separation of functions within the Justice Department, so that a corps of adjudicators could be developed outside the INS who would be specially trained and who would focus exclusively on asylum would certainly be an important step towards a more objective approach.

But whatever reforms are made in the adjudication *process*, so long as the asylum *standard* remains the same, the overwhelming majority of Central American and Haitian asylum seekers are still unlikely to be granted asylum. Denial is likely to result for any of three reasons. 1) Some applicants, most likely a relative few, will have attempted to abuse the asylum system with frivolous claims. 2) At the other end of the spectrum, others might have true and legitimate fears of persecution, but will be denied because either a) they fail to articulate and document adequately their claims, or b) U.S. asylum adjudicators apply the standard too narrowly in their cases. 3) In the middle, stand the majority of the aliens to whom we spoke. This group had weak cases in terms of a strict application of the standard of a fear of individualized persecution, but *not* frivolous claims. The majority pointed to a mix of political and economic motives created by civil strife and political violence as the reasons for having fled and for fearing return. These upheavals and violence were not necessarily directed against them as individuals, however.

But the "persecution" standard in U.S. refugee law implies individual targeting of the kind associated with human rights abuses such as unfair trials, political imprisonment, and torture. As horrible as individual persecution of this kind is, it does not tell the whole story of the abuses that refugees in today's world legitimately fear.

Human rights abuses in those parts of the world from which the overwhelming majority of the world's refugees currently flee are frequently not the result of targeting individuals for punishment. Often, human rights abuses are wide and indiscriminate, intended to intimidate, or even destroy, whole classes or groups. These abuses tend to be extrajudicial in nature, through anonymous threats or attacks by death squads, guerrilla forces, or other shadowy elements with or without links to governments. In much of Central America, for example, political imprisonment is not now the means for repressing dissent. Unfair trials are not an issue, for example, if no trials are held at all. Rather, villages are destroyed, indigenous populations are massacred, young men are forcibly conscripted en masse by government or insurgent forces, and people broadly identified as subversives are "disappeared."

Articulating and documenting individual claims in such circumstances is extremely difficult. And, even if the harm that the person has suffered or fears is genuine, is it persecution?

In *Matter of Mogharrabi*, setting forth the post-*Cardoza-Fonseca* interpretation of a "well-founded fear," the Board of Immigration Appeals said, "Aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum." The BIA has pointed to the legislative history of the Refugee Act to show that Congress did not intend to include those fleeing civil war. The Senate version of the bill had included "any person who has been displaced by military or civil disturbance or uprooted because of arbitrary detention," but the conference committee that resolved the differences between the House and Senate versions dropped this language from the Act.

A series of decisions in 1988 moved the BIA into even more narrow interpretations of "persecution" when it occurs in the context of civil war. It has arrived at a paradoxical position that, in effect, favors asylum seekers from less violent and dangerous places, while, essentially, requiring a higher standard of persecution from areas where political violence is now more widespread. In a number of cases involving the BIA's denial of asylum to Salvadorans fleeing their civil war (see USCR's "Back of the Hand"), the Board has ruled that "civil wars or revolutions have always contained strong currents of violence, threats, destruction, intimidation, and indeed ruthlessness." But, said the BIA

in *Matter of Maldonado-Cruz*, "Individuals harmed by such violence or threats of harm in a civil war are not persecuted 'on account of' the five categories enumerated in . . . the Act [i.e., race, religion, nationality, membership in a particular social group, or political opinion]."

While the BIA acknowledges that people can be harmed, presumably tortured and summarily killed, such acts are not deemed to be persecution if they occur in the context of civil war or revolution.

In an earlier case, *Bolanos-Hernandez v. INS*, the Ninth Circuit Court of Appeals criticized this line of reasoning, saying,

> "The Board's conclusion that the threat against Bolanos' life was insufficient simply because it was representative of the general level of violence in El Salvador constitutes a clear error of law. We are mystified by the Board's ability to turn logic on its head. While we have frequently held that general evidence of violence is insufficient to trigger section 243(h)'s prohibition against deportation, not once have we considered a specific threat against a petitioner insufficient because it reflected a general level of violence . . . It should be obvious that the significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened. If anything . . . that fact may make the threat more serious and credible."

The BIA has stated in another case, *Matter of Fuentes*, that it would not apply the *Bolanos-Hernandez* ruling outside the Ninth Circuit. That is unfortunate. The situations so many of today's asylum seekers are fleeing require more, not less, attention to the nuances of the law that allow for a more generous application in borderline cases. This was certainly the intent of the Supreme Court in its landmark *Cardoza-Fonseca* decision. For example, the Supreme Court pointed out that the asylum eligibility determination turns "to some extent on the subjective mental state of the alien." It faulted the BIA for having paid insufficient attention to subjective fears on the part of asylum seekers.

Since *Cardoza-Fonseca*, which affirmed a more subjective standard than the BIA had been using on the question of "persecution," the BIA has been whittling down the objective grounds on which that fear can be based. The law says that a refugee's fear of persecution should be "on account of" any of five objective factors. Although several, such as nationality, race, and religion, are more clearly immutable characteristics, the other two grounds—"membership in a particular social group" and "political opinion"—do not lend themselves well to a construction as immutable characteristics (the position taken by the BIA). We can change our social groups and political opinions, but are not any less likely to be persecuted on account of them for that reason. The BIA has declined to apply these two terms in any but the most limited cases. The Board has said that it would not apply to cases arising in other federal circuits the Ninth Circuit's ruling in *Bolanos-Hernandez* that "political opinion" includes political neutrality in civil war. Similarly, in a case involving a Haitian, *Desir v. INS*, the BIA characterized beatings, imprisonment, assault, and extortion at the hands of the Ton Ton Macoute as resulting from personal conflict, not political opinion. In overruling the BIA, the Ninth Circuit said,

> "The Haitian government under Duvalier operated as a 'kleptocracy', or government by thievery, from the highest to the lowest level. The Ton Ton Macoutes . . . formed the heart of the system . . . Because the Macoutes are an organization created for political purposes, they bring politics to the villages of Haiti. To challenge the extortion by which the Macoutes exist, is to challenge the underpinnings of the political system."

When given the opportunity in *Matter of Sanchez and Escobar* to give a liberal reading of "social group" that would have included young, urban, working-class men of draft age in El Salvador, the BIA declined. Yet the history of the phrase from the drafting of the 1951 *Convention Relating to the Status of Refugees*, upon which the U.S. law is based, suggests that the United States is applying the term too narrowly. Atle Grahl-Madsen, the leading authority on the drafting of the 1951 *Convention*, has noted that its drafters considered "social group" to be of broader application than ethnic or religious identifications, and intended it to fill a gap in protection not covered by the four other reasons enumerated for persecution in the *Convention*. In addition, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* says that membership in a particular social group "normally comprises people of similar background, habits, or social status" and suggests that such membership could be a ground for persecution when "there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies."

As these examples suggest, there is room within the language of the Refugee Act for a more generous determination of asylum. But, even so, the Act does not adequately address the need for—or the means of—protecting persons displaced as a result of civil war and seeking temporary shelter in our country. International humanitarian law provides guidance for an approach that extends the principle of *nonrefoulement*—the nonreturn of a refugee to a situation where his life or freedom would be threatened—to persons displaced by warfare. The Geneva Conventions of 1949 prohibit the repatriation of civilians into internal armed conflicts where breaches of the Geneva Conventions are

occurring. Also, the UNHCR Executive Committee's 1985 Note on International Protection says that the principle of *nonrefoulement* extends beyond refugees defined by the 1951 *Convention* who fear persecution. According to the UNHCR, "persons who cross international boundaries to escape from severe internal upheavals and armed conflicts should not be returned against their will to areas where they may be exposed to danger." While permanent asylum may not be mandated by customary international law, the forced return of even a "displaced person" is prohibited. Many of the people now being deported out of south Texas may not be "refugees" as classically defined in the 1951 *Convention* and the Refugee Act. But many are, at the least, "displaced persons" facing real dangers in their homelands who should not be returned against their will.

CONCLUSIONS AND RECOMMENDATIONS

1) SAFE HAVEN

CONCLUSION:

• **The United States is deporting people seeking refuge to countries where their safety cannot be guaranteed—and to which they are afraid to return. That is an unacceptable, inhumane practice.**

As a nation, we must be able to control the flow of would-be immigrants. But we also have a responsibility and commitment to provide safe-haven to those who come here in fear for their lives.

Although there are deep and disturbing problems with the implementation of our refugee law, a legal structure exists, at present, to provide asylum to those who can establish a well-founded fear of persecution in their homeland. But most of the recent asylum seekers at our borders cannot establish to the satisfaction of asylum adjudicators that they have been or are likely to be individually targeted for persecution. They do, nevertheless, often have legitimate fears for their lives and safety based on the high levels of political violence in their homelands. They are no less vulnerable and no less in need of protection than those refugees who meet the legal "persecution" standard. They should not be treated as just an immigration enforcement problem.

RECOMMENDATIONS:

• **A "safe haven" mechanism is urgently needed to prevent the deportation of persons who fear return to dangerous, violent conditions.**

The most immediate need is for the Attorney General to depoliticize the approach to granting temporary stays of deportation and to exercise his discretion to grant "extended voluntary departure" (EVD) on humanitarian grounds. The continued failure of this and the previous administration to do so forces those who seek a humanitarian solution to work for enactment of nationality-specific, safe haven legislation. Either Congress must take the initiative by passing the Moakley/DeConcini bill (H.R. 45/S. 458), which calls for a temporary suspension of deportation of Salvadorans and Nicaraguans in the United States, or the Attorney General must exercise his discretion (as he recently has done for Chinese nationals in the United States) to "defer departure" of these (and other) endangered nationality groups.

Such an approach provides a necessary temporary safety net for those who do not meet the high standard for being granted asylum, but who nevertheless could be harmed if returned to their home countries. Under the House version of the legislative proposal, to be eligible for temporary safe haven, the Nicaraguan or Salvadoran would have to have been in the United States before March 1, 1989 and would be required to register with the INS, but in so doing would be granted work authorization and protected from detention and deportation for a three-year period. The person would not be eligible for public assistance. Also, this would not provide a right to remain permanently in the United States—as does the granting of asylum, which opens the way for adjustment of status and eventual citizenship—but would protect a person pending a return to safe conditions in the home country.

2) INTERDICTION

CONCLUSION:

• **The interdiction of Haitian boat people on the high seas and their return to Haiti after superficial and perfunctory "hearings" aboard U.S. Coast Guard cutters is a travesty of justice in its own right, puts lives in danger, and shows discriminatory treatment towards a particular nationality group.**

It defies any reasonable explanation that out of the more than 20,000 Haitians who have been interdicted at sea since 1981, only six persons have been brought ashore to pursue asylum claims. This is stark testament to prejudicial treatment by our government that is totally unacceptable.

RECOMMENDATIONS:

• **The interdiction program must be terminated. The Coast Guard should be used for genuine rescue-at-sea operations.**

Haitians rescued at sea by the U.S. Coast Guard should be brought to the United States for medical

examination and be given the opportunity to apply for asylum should they fear persecution in their homeland.

• **Haitians apprehended within U.S. territorial waters should be treated the same as aliens apprehended on land.**

Congress should abolish the legal fiction that Haitians who enter U.S. territorial waters have not entered U.S. territory and therefore are placed in the more disadvantageous "exclusion" proceedings as opposed to "deportation" proceedings. Haitians apprehended within U.S. territorial waters should be considered to have entered the United States and should be treated on an equal footing with any other aliens in deportation proceedings. Haitians rescued in international waters by the Coast Guard should have the right to apply for asylum in the context of exclusion proceedings.

3) ACCESS TO COUNSEL

CONCLUSION:

• **Undocumented aliens in detention in the United States are being denied access to legal counsel, resulting in the deportation or coerced departure of persons who, if they knew their rights and could be assisted, might apply for asylum or other forms of legal relief to which they are entitled. As a result, persons in many cases are being returned to dangerous conditions without ever having been given a meaningful opportunity to explain why they might fear return.**

The strongest and most lasting impression left from our interviews with aliens in detention in south Texas was of people who had little or no understanding of what was happening to them. U.S. asylum policies and procedures are complex and, especially during late 1988 and early 1989, were shifting sharply and often. Whether there is a conscious intent to deny legal access or not, the fact is that only a small fraction of the persons detained in south Texas from the refugee-producing countries of Central America have been able to be represented or advised by legal counsel. Detained in remote facilities in areas with few immigration attorneys, most of the detainees are left on their own to navigate a complicated and confusing system.

The U.S. General Accounting Office in a June 1987 report has shown that unrepresented applicants are denied asylum more than twice as often as applicants represented by attorneys in hearings before the INS, and that unrepresented applicants in hearings before immigration judges are denied three times more often than those with an attorney. Our own observations suggest that the GAO statistics represent the tip of the iceberg, since the overwhelming majority of unrepresented aliens we encountered in detention did not exercise their right to apply for asylum at all.

RECOMMENDATIONS:

• **Attorneys and representatives of nonprofit agencies should have unimpeded access to INS detention facilities to give group "know your rights" orientations and to provide individual counseling to asylum seekers and potential asylum seekers.**

• **To the extent detention of asylum seekers remains an option at all, INS facilities should be located closer to urban centers where detainees will have a better chance to be represented.**

• **Given the slapdash manner in which asylum applications were filed in south Texas in the last half of 1988 and the first half of 1989, aliens who receive changes of venue with representation elsewhere in the United States should have the opportunity to submit new asylum applications without prejudice.**

Because the numbers of asylum seekers were so large, the number of qualified legal representatives so small, and the level of confusion so high, the I-589s asylum applicants filled out in Texas at that time are, with some exceptions, worthless and do not reflect the true stories of the asylum claimants. The INS has taken this as evidence of abusive and frivolous claims. It more accurately reflects that most of the Central Americans entering at the time were ignorant of the system. Many did not know they were applying for asylum. It remains to be seen whether their cases have merit. But the general level of mayhem and confusion, to which our own government contributed in no small part, should not now be used against them.

4) DETERRENCE

CONCLUSION:

• **Detention is used as a deterrent.**

The legal basis for detention of aliens in INS proceedings is limited to those likely to abscond or who pose a threat to the community or the security of the United States. Yet, INS documents explicitly acknowledge "the purpose of detention as deterrent" (INS Enhancement Plan for the Southern Border, 2/16/89 p. 8). This is an illegal and illegitimate reason for detention. Judge David Kenyon observed in *Orantes-Hernandez* that detention is "inherently coercive and often deliberately intimidating." We concur. More broadly, he observed that INS misconduct "is not the result of isolated transgressions by a few overzealous officer," but rather that INS policies form "a pattern and practice of illegal conduct which is approved, authorized and/or ratified by INS personnel at all levels."

RECOMMENDATIONS:

• **The INS should obey the law and the orders of U.S. courts.**

The INS is a law enforcement agency. Yet, its willingness to cut legal corners in pursuit of its deterrent goals disregards the very notions of fairness and justice our laws are intended to promote.

Time and time again, the INS drags its feet when called upon to ameliorate abusive conditions. Whether concerning the treatment of alien children in detention, work authorization for asylum seekers, access to legal counsel, or a host of other deterrent measures, the INS has rarely acted on its own to correct coercive practices, and, indeed, as in the case of *Orantes-Hernandez*, has been found to violate court injunctions.

Decent treatment of asylum seekers has been wrought by costly and time-consuming litigation. This adversarial process has created mistrust and ill-will between the INS and immigration and refugee service providers that is counterproductive to the interests of all parties.

• **Detention should be limited to aliens likely to abscond or who pose a threat to the community.**

Given its coercive nature, which risks compelling refugees to abandon their rights, detention should be the exception, not the rule.

5) CONDITIONS OF DETENTION

CONCLUSION:

• **The United States treats undocumented asylum seekers like criminals. Such treatment is an affront to their dignity and abusive of their rights.**

Undocumented aliens are *not* criminals (although a criminal could also be undocumented). Although crossing the border without authorization is illegal (like a traffic violation), it is not a criminal act (except in those few instances when an alien who has previously been deported is caught reentering the United States during the subsequent five years). Yet, undocumented aliens who seek political asylum in the United States are now being locked up behind bars and barbed wire fences, guarded, dressed in prison uniforms and marched from place to place, with limits imposed on recreation, on seeing loved ones, even on personal hygiene.

The image of victims of human rights abuse seeking freedom and protection in the United States being thrown into prison by our government is a sad and ironic one. Yet, our government, in effect, punishes those who try to avail themselves of our protection. For some, the victims of torture and trauma in their home countries, incarceration in the United States represents the "second blow"—an inhumane testing of their endurance through the notion that those truly fearful will stick it out, while those with less fear will abandon their asylum claims and return home. Testing asylum seekers' tolerance for incarceration is an irrational and inhumane method for determining the validity of refugee claims.

RECOMMENDATIONS:

• **To the extent detention of asylum seekers continues as U.S. policy, it should be of the "soft" variety as, for example, at the Red Cross shelter in Brownsville (currently available only for family groups), absent the alien presenting a danger to the community or a likelihood of absconding.**

Although required to be present for daily roll calls, those held at the Red Cross shelter are free to come and go during the day, wear civilian clothes, pursue recreational and educational objectives, and essentially govern their daily lives with minimal interference.

• **Children should be spared detention except in the most extraordinary circumstances.**

Unaccompanied alien children should be released as soon as possible after apprehension to parents, legal guardians, other responsible adults, or licensed child welfare agencies.

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The U.S. policies of interdicting and returning Haitian boat people and detaining and deporting Central Americans have repercussions far beyond America's borders. For better or worse, our country does set the standard for refugee protection that will be followed by many other countries. If the United States, with its historic adherence to due process and its wealth, cannot see fit to offer minimal levels of protection to refugees who throw themselves on our mercy, the whole system of refugee protection throughout the world runs the risk of unraveling. Lives truly hang in the balance, and not only Nicaraguan, Salvadoran, and Haitian lives. Protecting refugees is not without costs, but these are costs that it is absolutely necessary for our nation to bear if we hope to have a world safe for its most vulnerable members.

In addition to *Issue Briefs* on a variety of topics, USCR produces other publications.

The *World Refugee Survey*. $8.00 single copy. Contains widely cited country reports on refugee conditions, statistics on worldwide refugee populations, a directory of organizations, bibliography, and definitive statistics. Includes feature articles by authorities on refugee protection and assistance.

Refugee Reports. Monthly. $35.00 per year for subscription, which includes a copy of the *World Refugee Survey* and other USCR publications. It includes information about U.S. policy, legislation, programs, resources to assist refugees or inform the public, and research on refugee resettlement. It also contains articles on international refugee developments and statistics on refugee populations.

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